

A **TAN SRI DATO' SERI MUSA DATO' HJ HASSAN**

v.

DATO' SERI ANWAR IBRAHIM

B HIGH COURT MALAYA, KUALA LUMPUR
PRASAD SANDOSHAM ABRAHAM JC
[SUIT NO: S-23-123-2008]
11 AUGUST 2010

C **CIVIL PROCEDURE:** *Striking out - Writ of summons and statement of claim - Application for - Whether absolute privilege extends to similar statements made at different occasions and place other than occasion of making police report*

D The defendant's application to strike out the plaintiff's writ of summons and statement of claim (encl. 13) was fixed for hearing on 20 May 2010. The issue that arose was whether absolute privilege extended and flowed to similar statements being made at different occasions and place other than the occasion of making the police report.

E **Held (allowing plaintiff and defendant to amend their pleadings accordingly):**

F (1) If the occasion of the publication of a defamatory statement is privileged, the same is granted by either absolute or qualified privilege depending on the nature of the occasion. If the occasion is absolutely privileged, then it will be a complete defence to an action for libel even if the statement was actuated by malice. (para 4)

G (2) The extension of the plea of absolute privilege should be jealously guarded against save and except where the immunity is necessary ie the doctrine of necessity. (para 6)

H (3) Ancillary privilege can only arise if the police report is absolutely privileged. It is dependent upon the existence of this privilege. The lesser privilege *ie*, defence of qualified defence would also be available as a plea to the defendant. Ancillary privilege arises where if it is established at the impugned news conference the defendant regurgitates the contents of the police report. The privilege is ancillary to the privilege accorded to the police report although when at the news conference the press is not privy to the making of the police report itself. For ancillary

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privilege to apply, it is reasonable that the defendant in the position that he was would be subject to scrutiny by the media and thus repeating the contents of the police report, would possibly allow the plea of ancillary privilege to arise in a situation where for instance public interest justifies the publication of the police report. (para 7)

- (4) In the light of the above, this court answered the question of law in the negative with the rider that absolute privilege could extend based on necessity. Alternative pleas of ancillary privilege and qualified privilege were pleas available to the defendant. The plaintiff and the defendant were allowed to amend their pleadings accordingly. (para 8)

Case(s) referred to:

Abdul Manaf Ahmad v. Mohd Kamil Datuk Hj Mohd Kassim [2009] 2 CLJ 121 CA (*refd*)

Clarence Wilfred v. Tengku Adnan Tengku Mahmud & Anor [1983] 1 CLJ 136; [1983] CLJ (Rep) 518 HC (*refd*)

Mann v. O'Neill [1997] 71 ALJR (*refd*)

Taylor and Others v. Serious Fraud Office and Others [1998] 4 All ER 801 (*refd*)

Other source(s) referred to:

Evans on Defamation, 3rd edn, pp 142 & 143

For the plaintiff - Kamarul Hisham (Siti Maspuah with him); M/s The Chambers of Kamarul Hisham & Hasnal Rezua

For the defendant - SN Nair (Wan Annuar Shadat with him); M/s S Nair & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Prasad Sandosham Abraham JC:

[1] The defendant's application to strike out the plaintiff's writ of summons and statement of claim (encl. 13) was fixed for hearing on 20 May 2010. I made no order on the application but directed parties to submit on points of law on the following question ie, whether absolute Privilege extends and flows to similar statements being made at different occasions and place other than the occasion of making the police report. I delivered my judgment on the same on 30 July 2010 and I append below my reasons for so doing.

A [2] The facts as set out by the defendant are as follows:

3. The Plaintiff initiated this libel action in pursuance to a police report made by the Defendant 1.7.2008 ('the Police Report') (please refer to para 6 & 7 of the SOC)

B 4. The Plaintiff alleges that the words contained in the Police Report were defamatory of him.

5. The Plaintiff also alleges that there was verbal slander on him made by the Defendant (please refer to para 41 of the SOC).

C 6. The Defendant lodged the Police Report asking the police to investigate the Plaintiff and others for tampering of evidence. The Plaintiff was the investigating officer during the infamous sacking of the Defendant as the deputy Prime Minister of Malaysia and during the black-eye incident and the subsequent 1998 trials for corruption.

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[3] In the light of the decision of the Court of Appeal in *Abdul Manaf Ahmad v. Mohd Kamil Datuk Hj Mohd Kassim* [2009] 2 CLJ 121 where the Court of Appeal held:

E (3) When this appeal was called on, the attention of counsel on both sides was drawn to the decision of the Court of Appeal of the Federated Malay States in *Martin Rheinus v. Sher Singh* [1949] 1 LNS 49, where it was held that a statement made by a person to a police officer in the course of police investigation is absolutely privileged. In the course of his judgment, Willan CJ referred, without any criticism, to the observation of the trial judge in that case as follows:

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He [the trial judge] held, however, that the statement was absolutely privileged, and, after citing several Indian cases, decided that no distinction can be drawn between the privilege which must be accorded to an information given to a police officer under section 107 of the Criminal Procedure Code and to a statement recorded by a police officer under section 112.

H (4) It is implicit from *Martin Rheinus v. Sher Singh* that both statements made in first information reports under s. 107 of the Criminal Procedure Code and in police statements made under s. 112 thereof are absolutely privileged for the purpose of the law of defamation. I consider this to be good law. And I find support for the view I take of the matter from the decision of several Indian cases including *Bapalal & Co v. V Krishnaswami Iyer* AIR [1941] Mad 26. That was a case in

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which a letter of complaint to the police by the defendant alleging that the plaintiff had committed a crime was held to be absolutely privileged and therefore not actionable. By reason of what I have said thus far, I am unable to agree with the view expressed in *Hoe Thean Sun & Anor v. Lim Tee Keng* [1999] 1 CLJ 187, that a defamatory statement in a police report is only protected by the defence of qualified privilege. It is apparent from the report of the case that the decision in *Martin Rheinus v. Sher Singh* was not brought to the attention of the High Court. There is no doubt that defamatory statements in police reports must attract the defence of absolute privilege for reasons of public policy. If actions can be brought against complainants who lodge police reports, then it would discourage the reporting of crimes to the police thereby placing the detection and punishment of crime at serious risk. The criminal law readily provides for a remedy against persons who make false police reports.

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[4] The reasoning is one grounded on public policy and is linked to the venue and the purpose the statement ie, the police report is made. If the occasion of the publication of a defamatory statement is privileged, the same is granted by either absolute or qualified privilege depending on the nature of the occasion. If the occasion is absolutely privileged, then it will be a complete defence to an action for libel even if the statement was actuated by malice.

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[5] If after lodging the Police Report, the defendant repeats the contents of the Police report at a press conference would absolute privilege extend as a defence to an action for libel as in our case? The defendant to put it simply, says once the Police Report is absolutely privileged it remains so at whatever occasion it is published. The plaintiff submitted whilst it is agreed the Police statement *per se* is absolutely privileged when taken, it does not extend to other occasions when it is reproduced. I refer to the decision of the House of Lords in *Taylor and Others v. Serious Fraud Office and Others* [1998] 4 All ER at p. 801, NB particular p. 813 of the report the judgment of Lord Hoffmann:

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In *Mann v. O'Neill* [1997] 71 ALJR 903 at p. 907 the judgment of Brennan CJ, Dawson, Toohey and Gaudron JJ describes the rationale as one of necessity:

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It may be that the various categories of absolute privilege are all properly to be seen as grounded in necessity, and not on broader grounds of public policy. Whether or not that is so, the general rule is that the extension of absolute privilege is

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- A “viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated.” Certainly, absolute privilege should not be extended to statements which are said to be analogous to statements in judicial proceedings unless there is demonstrated some necessity of the kind that dictates that judicial proceedings are absolutely privileged.
- B Thus the test is a strict one; necessity must be shown, but the decision on whether immunity is necessary for the administration of justice must have regard to the cases in which immunity has been held necessary in the past, so as to form part of a coherent principle.
- C Approaching the matter on this basis, I find it impossible to identify any rational principle which would confine the immunity for tout of court statements to persons who are subsequently called as witnesses. The policy of the immunity is to enable people to speak freely without fear of being sued, whether successfully or not. If this object is to be achieved, the person in question must know at the time he speaks whether or not the immunity will attach. If it depends upon the contingencies of whether he will be called as a witness, the value of the immunity is destroyed. At the time of the investigation it is often unclear whether any crime has been committed at all. Persons assisting the police with their inquiries may not be able to give any admissible evidence; for example, their information may be hearsay, but none the less valuable for the purposes of the investigation. But the proper administration of justice requires that such people should have the same inducement to speak freely as those whose information subsequently forms the basis of evidence at a trial.
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(See also *Mann v. O'Neill* [1997] 71 ALJR a decision of the High Court of Australia).

- G [6] I find the extension of the plea of absolute Privilege should be jealously guarded against save and except where the immunity is necessary ie, the doctrine of necessity. The defendant will have to satisfy the court that the interest of justice & necessity requires the protection of absolute privilege needs to be extended to the impugned press conference.
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- I [7] What then would be the position if say for instance, the defendant lodges a police report and then outside the Police Station the defendant is accosted by the press and the defendant repeats the contents of the Police report would it then attract Privilege? I find in such a case an alternative plea for ancillary Privilege would be

available to the defendant. Ancillary privilege can only arise if the Police Report is absolutely privileged. It is dependent upon the existence of this Privilege (see *Evans on Defamation* 3rd edn, pp. 142 & 143, see also *Clarence Wilfred v. Tengku Adnan Tengku Mahmud & Anor* [1983] 1 CLJ 136; [1983] CLJ (Rep) 518). The lesser privilege ie, defence of qualified defence would also be available as a plea to the defendant. Ancillary Privilege arises where if it is established at the impugned news conference the defendant regurgitates the contents of the Police report. The privilege is ancillary to the privilege accorded to the Police Report although when at the news conference the press is not privy to the making of the police report itself. For ancillary privilege to apply, is it reasonable the defendant in the position that he was would be subject to scrutiny to by the media and thus repeating the contents of the Police report, would possibly allow the plea of ancillary privilege to arise in a situation where for instance Public interest justifies the publication of the Police Report.

[8] In the light of the above I answered the question of law in the negative with the rider that absolute privilege could extend based on necessity. I am also of the view the alternative pleas of ancillary privilege and qualified Privilege are pleas available to defendant. I allowed the plaintiff & the defendant to amend their pleadings accordingly. As a post script, the court records its appreciation to the submissions and the authorities tendered to court by respective counsel in this interesting area of the law.

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